(2)

No. 88-224

In The
Supreme Court of the United States
October Term, 1988

MICHAEL T. HULL,

Petitioner,

v.

ATTLEBOROUGH SAVINGS BANK,

Respondent.

BRIEF OF ATTLEBOROUGH SAVINGS BANK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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ADDITIONAL PARTIES

This information is provided to meet the requirements of Supreme Court Rule 28.1. In 1987 Attleborough Savings Bank merged with Pawtucket Savings Bank to become Attleborough Pawtucket Savings Bank. Its non-wholly owned subsidiaries and affiliates are Mutual Advisory Corporation, First Systems Corporation and Baneware Incorporated.

Additional respondents are Edward F. Casey, Edward J. Casey and Maria Y. Casey.

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STATEMENT OF THE CASE

The petitioner's Statement of the Case contains two inaccuracies which seriously affect the issues he intends to present. First, on page 8 the petitioner states that the summary judgment affidavits and depositions contained the fact that the petitioner "was adjudicated in 1984 to have been insane since March 1980 and continuing until the 1984 adjudication." Although this was one of the allegations of his complaint, it was not among the facts which were available to the state courts in passing upon the motions for summary judgment. This fact critically affects whether or not the state court decided or even reached the federal question.

Second, on page 5 the petitioner states that the foreclosure sale was "conducted pursuant to an authorizing judgment of a state court". What he characterizes as an authorizing judgment was an independent determination by the Massachusetts Land Court that there was no one entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act and did not in any way authorize, permit or validate the private foreclosure sale. This fact directly affects the element of state action, a necessary foundation for the petitioner's Fourteenth Amendment due process claim.

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REASONS FOR DENYING THE PETITION

The petitioner invites the Court to grant the writ of certiorari in order to put an end to a perceived state court

erosion of the rule of *Covey v. Somers*, 351 U.S. 141 (1956) or in the alternative to extend the rule. Were the Court inclined to consider these matters, this case is not an opportunity to do so. The view of the facts properly taken by the state courts preempts the federal question. In any event the lack of state action precludes the "due process" claim.

I. The Federal Question Cannot Arise On The Facts Presented to the State Court.

The petitioner claims that he was entitled, under the rule of *Covey v. Somers*, to have a guardian appointed for him before his mortgage was foreclosed by the respondent-bank. In *Covey* it was held that due process required the appointment of a guardian for a known incompetent before a town could foreclose a real estate tax lien on her property.

In our case all of the petitioner's claims, except his claim that he was not given the foreclosure notice required by state law, were dismissed by the allowance of the respondents' motions for summary judgment. The trial court and the Massachusetts Appeals Court ruled that the facts to be considered on the motions for summary judgment were insufficient to establish his claim under the *Covey* rule. Brief of Petitioners at App. D-5; B-10; C-8-10.

The petitioner claims that the second Massachusetts Appeals Court decision takes the view that the facts in the summary judgment record establish that he was mentally incompetent at the time of the foreclosure. From this untenable footing his argument focuses upon what the respondents knew of his condition. A fair reading

of the decision shows that the Massachusetts Appeals Court concluded that the facts do not establish the petitioner's mental incompetence at the time of the foreclosure.

At page 8 of his petition, the petitioner injects into the proper summary judgment facts something which has no factual support in the record, "[t]hat he was adjudicated in 1984 to have been insane since March 1980 and continuing until the 1984 adjudication." This may have been a bare allegation in his unverified complaint, but it was not a fact making up the record upon which the motions for summary judgment had to be decided.

The Massachusetts Appeals Court explicitly drew a distinction between the allegation of incompetence in his complaint and the deficient summary judgment facts when it said: "[a]lthough the plaintiff states in his complaint that he was 'adjudicated insane' in March of 1980 for a mental illness 'in remission since 1984,' we do not see the existence of facts which, if established at trial, would entitle him to relief on this claim." Brief of Petitioner at App. C-8.

Rather than turning on the question of what the respondent-bank knew of the petitioner's mental condition, the Massachusetts Appeals Court decision focused on what the record showed the petitioner's mental condition to be, in the light most favorable to him. By citing page 69 and note 5 of *Commonwealth v. Olivo*, 369 Mass. 62, 337 N.E.2d 904 (1975), and page 326 of *Boston v. Ditson*, 4 Mass. App. Ct. 323, 348 N.E.2d 116 (1976), the Massachusetts Appeals Court surely meant that before any duty to appoint a guardian can arise the subject person must be shown to be incompetent at the very least. Brief of Petitioner at App.

C-12. Both the *Olivo* and the *Ditson* cases involved people who, although atypical, were not shown to be incompetent and thereby entitled to more than the usual notice provided for competent persons. The cited portions of both the *Olivo* and *Ditson* decisions specifically distinguished their facts concerning lack of competence with the facts involved in the *Covey* case. There can be little doubt that the Massachusetts Appeals Court found the summary judgment facts to fall short of showing the incompetence necessary to trigger the guardian appointment requirements of *Covey*.

Massachusetts case law supports the Appeals Court's view of the summary judgment facts. Although the facts must be viewed in the light most favorable to the petitioner on the issue of his mental capacity, the facts must be considered without the benefit of any opinions or conclusions of lay witness. *Commonwealth v. Spencer*, 212 Mass. 438, 447, 99 N.E. 226 (1912). Lay witness observations may be considered by the court in drawing the legal conclusion. *O'Brien v. Collins*, 315 Mass. 429, 435, 53 N.E.2d 222 (1944).'

The facts show that the petitioner was using drugs, neglecting his business, his clients, and his personal hygiene, engaged in bizarre and erratic behavior and having emotional problems. These facts would not support a finding of mental incompetence. *Taylor v. Creeley*, 257 Mass. 21, 29-30, 152 N.E. 3 (1926). The lay witnesses' opinions that he was "not playing with a full deck" and "crazy" were properly ignored. *Stanton Industries, Inc. v. Columbus Mills, Inc.*, 4 Mass. App. Ct. 793, 794, 344 N.E.2d 199 (1976), *Florio v. Kennedy*, 18 Mass. App. Ct. 917, 918, 455 N.E.2d 1230 (1984). Without factual support for the petitioner's claim of incompetence, the state courts could

not reach the federal question and were correct in distinguishing this case from *Covey*.

II. The Necessary "State Action" is Absent.

The Fourteenth Amendment of the Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The Amendment is directed to the states and as such "can be violated only by conduct that may be fairly characterized as 'state action'." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982).

On page 5 of the petition, the petitioner breezes over the state action requirement by the inaccurate statement that "[t]he foreclosure sale was conducted pursuant to an authorizing judgment of a state court." The record more accurately shows that, rather than being a judgment authorizing the foreclosure sale, the state court proceeding was merely a Land Court action limited to the purpose of ascertaining the existence of interested parties who were entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act § 532(3), 50 App. U.S.C. 501 (1982) by reason of their military service. Brief of Petitioner at App. C-6.

In the case of *Beaton v. Land Court*, 367 Mass. 385, 390, 326 N.E.2d 302 (1975) it was held that such proceedings are not in themselves mortgage foreclosure proceedings but rather occur independently of the actual foreclosure and any judicial determination of the general validity of the foreclosure; that the proceedings are simply a means for a mortgagee to make certain that there will be no cloud on the title following the foreclosure as a result

of an interested party having been in or just released from the military; and that failure to employ such proceedings would not invalidate the foreclosure as to anyone not entitled to the protection of the Act. In the *Beaton* case an interested party who was not entitled to the benefits of the Act attempted to file an answer in the Soldiers' and Sailors' equity proceeding seeking to raise defenses to the foreclosure apart from the Act. It was held that no one but a person in or recently released from the military service could appear or answer in such proceedings.

Because the petitioner was not entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act, he could not have appeared in the Land Court proceedings and therefore the proceeedings could have had no effect on any of his rights. Brief of Petitioner at App. C-7. The judgment arising out of the proceedings, in which the petitioner had no standing to participate, cannot operate as the necessary state action to support his Fourteenth Amendment due process claim. The Land Court proceeding could neither authorize nor prevent the foreclosure sale from occurring. The power of sale in the mortgage did not need court validation and the Land Court's determination had no bearing on the respondent's ability to carry out its power of sale. It was the exercise of the power of sale and not the Land Court judgment which deprived the petitioner of his property.

The strongest state action claim, it would seem the petitioner could make would be that he and the respondent-bank entered into a contract which provided that upon the petitioner's default the respondent could exercise the Statutory Power of Sale authorized by a state statute,

Mass. Gen. L. ch.183, § 21 (1987). As this Court established in the case of *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 164-165 (1978) the state is in no way responsible for a private creditor's decision to employ a statutory remedy to sell a debtor's property to satisfy its lien.

Neither the Land Court proceeding nor the existence of the statutory foreclosure remedy is governmental participation in the deprivation of the petitioner's property rights rising to the level of state action. Without state action there can be no violation of the Fourteenth Amendment right to due process and therefore no federal question to present.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for the writ of certiorari should be denied.

Respectfully submitted,

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Dated August 31, 1988